

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION

UNITED STATES OF AMERICA

VS.

CRIMINAL NO. 3:06-cr-80-WHB  
APPEAL NO. 08-60693

MONQUEEN McNAIR

OPINION AND ORDER

This cause is before the Court on the Motion of Defendant, Monqueen McNair ("McNair"), to Consider Excusable Neglect for Delay in Filing the Notice of Appeal. As McNair is proceeding on this Motion *pro se*, his pleading has been liberally construed. See United States v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994).

On June 25, 2008, the Court entered an Opinion and Order denying McNair's *pro se* Motion for Re-sentencing Pursuant to 18 U.S.C. § 3582(c)(2). Thereafter, McNair appealed the decision to the United States Court of Appeals for the Fifth Circuit. On September 9, 2008, the Fifth Circuit entered an Order finding that McNair's notice of appeal was untimely. Specifically, the Fifth Circuit found that "to be timely, the [notice of appeal] had to be filed on or before July 10, 2008," and that McNair had "dated his notice of appeal July 12, 2008..." See United States v. McNair, No. 08-60693, slip op. at 1 (Sept. 9, 2008). Thereafter, the case was remanded to this Court to "determine whether there was excusable neglect or good cause for [McNair's] delay in filing the notice of appeal." Id. at 2.

In accordance with the Order of the Fifth Circuit, this Court entered an Order directing McNair "to file a pleading with the Clerk of this Court explaining whether there was excusable neglect or good cause for the delay in the filing of his Notice of Appeal." See Order of Sept. 12, 2008 [Docket No. 22]. McNair responded to the Order by filing the subject Motion to Consider Excusable Neglect for Delay in Filing the Notice of Appeal. See Motion [Docket No. 24]. In his Motion, McNair claims "that he placed his Notice of Appeal in the prison mail box" and that although "he filed his NOA timely, ... the mail room neglected to forward the NOA timely." Id.

Under Rule 4 of the Federal Rules of Appellate Procedure: "The district court may extend the time to file a notice of appeal if ... th[e] party shows excusable neglect or good cause." FED. R. APP. P. 5. The Court finds that McNair's claim does not establish either. The Fifth Circuit has recognized that a notice of appeal is deemed filed "as of the moment it was delivered to prison officials." Cooper v. Brookshire, 70 F.3d 377, 379 (5th Cir. 1995) (citing Houston v. Lack, 487 U.S., 266, 268-69 (1988)). In the present case, viewing the pleadings in the light most favorable to McNair, the earliest date on which he could have delivered his notice of appeal to prison officials for mailing was July 12, 2008, as that is the date on which he signed it. To be timely, however, McNair's notice of appeal would have had to been dated and

delivered to the prison officials for mailing on or before July 10, 2008. As McNair has not argued that the date appearing on his notice of appeal was incorrect, and as he has not submitted any evidence to show that he delivered it to prison officials for mailing on or before July 10, 2008, the Court finds that he has neither shown excusable neglect nor good cause and, therefore, that there is no basis for extending the time period for filing a notice of appeal under Rule 4 of the Federal Rules of Appellate Procedure.

Accordingly:

IT IS THEREFORE ORDERED that Defendant has failed to show excusable neglect or good cause for the purpose of extending the period in which to file a notice of appeal under Rule 4 of the Federal Rules of Appellate Procedure.

IT IS FURTHER ORDERED that Defendant's Motion to Consider Excusable Neglect for Delay in Filing the Notice of Appeal [Docket No. 24] is hereby denied.

IT IS FURTHER ORDERED that the Clerk of this Court is directed to send a copy of this Opinion and Order to the Clerk for the United States Court of Appeals for the Fifth Circuit for filing in Appeal No. 08-60693.

SO ORDERED this the 15th day of October, 2008.

s/William H. Barbour, Jr.  
UNITED STATES DISTRICT JUDGE